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# Finishing Off Forced Fatherhood: Does It Really Matter if Blood or DNA Evidence Can Rebut the Presumption of Paternity?

Jacinta M. Testa\*

## I. Introduction

A party seeking to challenge the paternity of a child born during wedlock faces a rather onerous task.<sup>1</sup> In Pennsylvania, courts have applied the doctrine of the presumption of paternity in cases in which the paternity of a child born during wedlock is challenged.<sup>2</sup> The presumption of paternity is a theory of law that presumes that a woman's husband is the father of her child.<sup>3</sup>

The presumption of paternity is inequitable and unrealistic from a logical standpoint. Because its application forbids the use of blood and DNA evidence to determine paternity without first overcoming the presumption, the presumption of paternity ignores reality in exchange for recognizing ancient common law. Even if the presumption of paternity is not applied, the Pennsylvania courts tend to apply the doctrine of paternity by estoppel to achieve similar results.<sup>4</sup>

Many have criticized the presumption of paternity and the doctrine of paternity by estoppel because of the inequitable results.<sup>5</sup> Chief Justice

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1. See *infra* notes 25-46 and accompanying text.

2. See, e.g., *Fish v. Behers*, 741 A.2d 721 (Pa. 1999) (addressing and discussing the doctrine of the presumption of paternity); *Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999) (addressing and discussing the doctrine of the presumption of paternity); *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997), *aff'd*, 720 A.2d 764 (Pa. 1998) (applying the doctrine of the presumption of paternity).

3. See *Fish*, 741 A.2d at 721; *Strauser*, 726 A.2d at 1052; *Miscovich*, 688 A.2d at 726.

4. See *Fish*, 741 A.2d at 721 (applying the doctrine of paternity by estoppel in a strict manner to hold a husband responsible for the child born during his marriage to his wife, but actually fathered by another man).

5. See, e.g., *Brinkley v. King*, 701 A.2d 176 (Pa. 1997) (Nigro, J. and Newman, J., dissenting); Alex Tresniowski et al., *Dads By Default*, PEOPLE MAG., Nov. 25, 2002, at

Flaherty of the Pennsylvania Supreme Court stated that the doctrines create a legal fiction:

The presumption of paternity and the doctrine of estoppel, therefore, embody the two great fictions of the law of paternity that regardless of biology, the married people to whom the child was born are the parents; and the doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who cared for the child is the parent.<sup>6</sup>

The impact of the "two great fictions of the law of paternity"<sup>7</sup> is felt beyond the courtroom. In past cases, the presumption of paternity and the doctrine of paternity by estoppel supported a deceitful and unfaithful wife's misrepresentation to her husband by legally determining the husband to be the father of a child conceived during an extramarital affair.

Imagine the following hypothetical.<sup>8</sup> Husband and wife are married; wife becomes pregnant and gives birth to a child. But, during the marriage and at the time of conception, wife engages in an extramarital affair. Wife fails to inform husband of the affair and the possibility that he may not be the father of the child. After some time has passed, husband discovers wife's indiscretions and the parties separate. Husband now suspects that he is not the biological father of the child and wants proof of the paternity of the child. Husband and child submit to blood tests that exclude husband as the father of the child. Husband refuses to pay support. Logically it seems that the husband should not be liable for the child's support. But, the court will analyze, in some way, the legal doctrines of the presumption of paternity and paternity by estoppel. Consequently, it is possible that the husband will be held legally responsible for his wife's child.

In the late 1990s, the above hypothetical was reality for at least two ex-husbands. Two Pennsylvania Superior Court decisions found ex-husbands to be the legal father of their adulterous wives' children by applying the presumption of paternity.<sup>9</sup> These examples demonstrate the courts' struggle with the presumption of paternity and paternity by estoppel. Some courts appear to have misapplied and misunderstood the

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78 (discussing the problems associated with the doctrine of the presumption of paternity across the nation).

6. *Id.* at 180. Although Chief Justice Flaherty recognized that the doctrines create a legal fiction, he still appeared to support the use of the doctrines of the presumption of paternity and paternity by estoppel. *Id.*

7. *Id.*

8. See Tresniowski et al., *supra* note 5.

9. *Amrhein v. Cozad*, 714 A.2d 409 (Pa. Super. Ct. 1998); *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997), *aff'd*, 720 A.2d 764 (Pa. 1998).

presumption of paternity and under-analyzed the doctrine of paternity by estoppel. It was not until 1999 that the Pennsylvania Supreme Court brought some clarity to the issue.<sup>10</sup>

Further, in the past five years several members of the Pennsylvania General Assembly reacted to the injustice associated with both the presumption of paternity and the doctrine of paternity by estoppel and to the several pivotal Pennsylvania Supreme Court decisions in the late 1990s. The Pennsylvania legislature has looked at several different proposed bills that would affect the presumption of paternity and the doctrine of paternity by estoppel.<sup>11</sup>

The purpose of this Comment is to discuss the harm associated with the Pennsylvania courts' past problematic definition and application of the presumption of paternity and the doctrine of paternity by estoppel. Second, this Comment will discuss how the Pennsylvania Supreme Court decision in *Fish v. Behers* changed the way courts apply the presumption of paternity. Further, this Comment will address the issues associated with the Pennsylvania courts' reluctance to allow the admission of blood and DNA evidence to rebut the presumption of paternity. Finally, this Comment will analyze how legislation could affect the court's treatment and application of the presumption of paternity and paternity by estoppel.

Section II of this Comment will provide the historical development of the presumption of paternity and the doctrine of paternity by estoppel in Pennsylvania law. Section III will provide the more recent developments in the law of the presumption of paternity. Section IV will discuss the impact of the recent developments in the law. Section V will discuss how the proposed legislation is no longer needed because the most egregious of the inequities caused by the presumption of paternity and paternity by estoppel have been eliminated.

## II. Background: Historic Development of the Presumption of Paternity

### A. *The Origin of the Presumption of Paternity*

The presumption of paternity has been characterized as one of the

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10. See *Fish v. Behers*, 741 A.2d 721 (Pa. 1999).

11. See H.R. 2701, 186th Gen. Assem., Reg. Sess. (Pa. 2001) (proposed bill in Pennsylvania House of Representatives in 2001); S. 802, 186th Gen. Assem., Reg. Sess. (Pa. 2001) (proposed bill in the Pennsylvania Senate in 2001); H.R. 521, 185th Gen. Assem., Reg. Sess. (Pa. 1999) (proposed bill in Pennsylvania House of Representatives in 1999); H.R. 522, 185th Gen. Assem., Reg. Sess. (Pa. 1999) (proposed bill in Pennsylvania House of Representatives); H.R. 523, 185th Gen. Assem., Reg. Sess. (Pa. 1999) (proposed bill in Pennsylvania House of Representatives); S. 516, 184th Gen. Assem., Reg. Sess. (Pa. 1999) (proposed bill in Pennsylvania Senate in 1999).

strongest presumptions known in the law.<sup>12</sup> It is a legal theory that presumes “that a child born to a married woman is the child of the woman’s husband.”<sup>13</sup> Traditionally, the methods of rebutting the presumption of paternity were extremely limited: “the presumption could be rebutted only by proof either that the husband was physically incapable of fathering a child or that he did not have access to his wife during the period of conception.”<sup>14</sup>

The legal theory of the presumption of paternity originated at common law.<sup>15</sup> The presumption of paternity originated as the presumption of legitimacy.<sup>16</sup> The presumption of legitimacy was a mechanism to legitimize children in order to avoid “bastardization.”<sup>17</sup> As recognized by the Pennsylvania Supreme Court, “the status ‘illegitimate’ historically subjected a child so labelled [sic] to significant legal and social discrimination.”<sup>18</sup> Until 1971 in Pennsylvania, any child born out of wedlock was considered “illegitimate.”<sup>19</sup> In 1971, Pennsylvania eliminated the categories of “legitimate” and “illegitimate” children.<sup>20</sup> The Pennsylvania legislature enacted legislation that stated that all children, whether born in wedlock or out of wedlock, will be treated as if they were born to married parents.<sup>21</sup>

In 1990, the Pennsylvania Supreme Court abandoned the language of “presumption of legitimacy.”<sup>22</sup> The court began using the language “the presumption that a child born to a married woman is the child of the

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12. See *Strauser v. Stahr*, 726 A.2d 1052, 1053-54 (Pa. 1999) (stating that the “presumption at issue—that a child born to a married woman is the child of the woman’s husband—has been one of the strongest presumptions known to the law”); see also *John M. v. Paula T.*, 571 A.2d 1380, 1383 (Pa. 1990) (stating that the presumption of paternity is extremely strong); *Cairgle v. Am. Radiator & Standard Sanitary Corp.*, 77 A.2d 439, 442 (Pa. 1951) (stating in majority opinion that “presumption of legitimacy is, however, still one of the strongest known to law”).

13. *Strauser*, 726 A.2d at 1053.

14. *Id.* at 1054.

15. *Commonwealth v. Shepherd*, 6 Binn. 283, 286 (Pa. 1814).

16. *Cairgle*, 77 A.2d at 442.

17. See *John M.*, 571 A.2d at 1384 n.2 (“The ‘presumption of legitimacy’ arose from the reluctance in the law to declare a child ‘illegitimate’ because the status ‘illegitimate’ historically subjected a child so labelled [sic] to significant legal and social discrimination.”).

18. *Id.*

19. *Id.*

20. See *id.* (discussing the historical development of the language used in regard to the presumption of paternity); see also 23 PA. CONS. STAT. § 5102 (2002) (“all children shall be legitimate irrespective of the marital status of their parents, and, in every case where children are born out of wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents.”).

21. 23 PA. CONS. STAT. § 5102 (2002) (declaring all children born in Pennsylvania to be legitimate).

22. *John M.*, 571 A.2d at 1384 n.2.

marriage.”<sup>23</sup> Thereafter, the phrase “the presumption of paternity” emerged as the common term used.<sup>24</sup>

Traditionally, the presumption that the child of a married woman was her husband’s child was very difficult to overcome.<sup>25</sup> One of the first cases the Pennsylvania Supreme Court decided on this issue only allowed a husband to rebut the presumption of paternity by proving non-access.<sup>26</sup> “Non-access” was established by proving either a great physical distance between the husband and wife or the husband’s sterility.<sup>27</sup>

Subsequent cases relaxed the original restrictions on the ability of a husband to rebut the presumption of the paternity of his wife’s child, but a husband still faced an uphill battle.<sup>28</sup> Specifically, the Pennsylvania Supreme Court relaxed its understanding of the requirements for proving non-access.<sup>29</sup> The Supreme Court of Pennsylvania interpreted a husband’s non-access to his wife as the lack of ability or opportunity to engage in sexual intercourse with his wife.<sup>30</sup> Yet, non-access was difficult to prove because neither the wife nor the husband could testify to non-access.<sup>31</sup>

Moreover, the presumption of paternity is difficult to overcome because the presumption may be rebutted only by evidence that is “clear, direct, convincing, and unanswerable.”<sup>32</sup> The Pennsylvania Supreme Court has also held that the presumption of legitimacy is irrebuttable when a third party, most often a “putative father,” seeks to challenge the paternity of a child born during wedlock.<sup>33</sup>

The Pennsylvania courts supported the presumption of legitimacy not only to avoid possible bastardization of children, but also because

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23. *Id.*

24. *See, e.g.,* *Fish v. Behers*, 741 A.2d 721 (Pa. 1999) (using the phrase “presumption of paternity” in the Pennsylvania Supreme Court); *Brinkley v. King*, 701 A.2d 176 (Pa. 1997) (using the phrase “presumption of paternity” in the Pennsylvania Supreme Court).

25. *Commonwealth v. Shepherd*, 6 Binn. 283, 286 (Pa. 1814).

26. *Id.* at 286-87.

27. *Id.*

28. *See* *Dennison v. Page*, 29 Pa. 420 (1857) (interpreting non-access as lack of ability or opportunity to engage in sexual relations); *see also* *Cairgle v. Am. Radiator & Standard Sanitary Corp.*, 77 A.2d 439 (Pa. 1951) (recognizing definition of non-access used in *Dennison*, but also stating that neither husband nor wife could testify to non-access, making it almost impossible to prove).

29. *Dennison*, 29 Pa. at 423.

30. *Id.*

31. *Id.* The courts have said that “neither the mother nor the father can bastardize it [a child born during marriage] by testifying to non-access.” *Cairgle*, 77 A.2d at 442.

32. *Dennison*, 29 Pa. at 423. However, the court did state that “it is not necessary that the possibility of access be completely excluded.” *Id.*

33. *Strauser v. Stahr*, 726 A.2d 1052, 1054-56 (Pa. 1999).

they desired to preserve the family unit.<sup>34</sup> The courts have stated that the presumption of paternity "is essential in any society in which the family is the fundamental unit and were [sic] founded in good morals and public decency."<sup>35</sup>

*B. The Effect of the Widespread Use and Acceptance of Scientific Blood Tests on the Presumption of Paternity*

The strength of the presumption of paternity in Pennsylvania law and the advancement of science and modern technology, specifically the developments in the arena of genetic testing, create an unusual tension in the law. In recent years, blood testing has become more and more accurate and is alleged to prove paternity, in most cases, by over 98%.<sup>36</sup> A Pennsylvania Supreme Court Justice stated that "the presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child are born are the parents."<sup>37</sup> Therefore, the presumption of paternity may delegate the role of father to one man, although fatherhood has been scientifically proven otherwise.<sup>38</sup>

Science and technology have played major roles in the ongoing saga of the law of the presumption of paternity in Pennsylvania. In 1961, Pennsylvania enacted the Uniform Act on Blood Tests To Determine Paternity ("UABT").<sup>39</sup> Section Five of the UABT states that blood grouping tests may be ordered by the court "[i]n a civil action in which the paternity parentage or identity of a child is a relevant fact."<sup>40</sup> It also provides that "[t]he presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child."<sup>41</sup>

The plain language of the UABT appeared to allow a party to use

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34. *Commonwealth ex rel. Goldman v. Goldman*, 184 A.2d 351, 354-55 (Pa. Super. Ct. 1962).

35. *Id.* (citing *Commonwealth ex rel. O'Brien v. O'Brien*, 390 Pa. 551, 556 (1957)).

36. *See, e.g., Brinkley v. King*, 701 A.2d 176, 185-86 (Pa. 1997); *see also* Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 LA. L. REV. 379 (1997) (discussing the impact of blood and tissue testing on paternity cases).

37. *Brinkley*, 701 A.2d at 180.

38. *See, e.g., Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999) (concluding that husband is the father of the child, although not the biological father); *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997) (determining ex-husband father for legal purposes, even though blood tests proved he was not the biological father and evidence was presented that he was fooled into believing he was the biological father of the child by his ex-wife).

39. 23 PA. CONS. STAT. § 5104 (2002).

40. *Id.*

41. *Id.*

blood evidence to rebut the presumption of paternity.<sup>42</sup> The first Pennsylvania judicial interpretation embraced the plain meaning of the text of the statute.<sup>43</sup> In *Commonwealth ex rel Goldman v. Goldman*, the Pennsylvania Superior Court allowed a party to use the results of a blood test to rebut the presumption of paternity in place of providing clear evidence of non-access or infertility.<sup>44</sup> The Pennsylvania Superior Court reasoned that the presumption of legitimacy was rebuttable prior to the enactment of the UABT, and the legislature had just added another method of rebutting the presumption.<sup>45</sup> Yet, in cases following *Goldman*, the Pennsylvania courts interpreted the statute in a manner almost completely contrary to the plain meaning.<sup>46</sup>

### III. Recent Developments in the Law of the Presumption of Paternity and Paternity by Estoppel

#### A. *The Ongoing Interpretation of the Uniform Act on Blood Tests To Determine Paternity in the Pennsylvania Courts and the Courts' Troubled Application of the Presumption of Paternity*

*Goldman* is not the law in Pennsylvania.<sup>47</sup> In 1990, in *John M. v. Paula T.*, the Pennsylvania Supreme Court held that a third-party alleged biological father could not force a husband to submit to blood testing to determine paternity.<sup>48</sup> In 1997, a divided court decided *Brinkley v. King*.<sup>49</sup> In *Brinkley*, the court allowed the use of blood evidence to determine paternity only because it had concluded that the presumption of paternity was inapplicable.<sup>50</sup>

In *John M. v. Paula T.*, a husband and wife were married and raising four children.<sup>51</sup> The plaintiff-appellee was wife's intimate partner

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42. *Id.*

43. *Commonwealth ex rel. Goldman v. Goldman*, 184 A.2d 351 (Pa. Super. Ct. 1962).

44. *Id.* at 354.

45. *Id.* at 354.

46. *See id.* at 351 (allowing blood evidence to rebut the presumption of paternity under the Uniform Act on Blood Tests); *see also Brinkley v. King*, 701 A.2d 176 (Pa. 1997) (holding that blood evidence is allowed because the parties were no longer married); *Jones v. Trojak*, 634 A.2d 201 (Pa. 1993) (allowing blood evidence to determine paternity, but only after the presumption of paternity was rebutted by other means); *John M. v. Paula T.*, 571 A.2d 1380 (Pa. 1990) (holding that a third party may not force the presumptive father to submit to blood tests to determine paternity).

47. *See cases cited supra* note 46.

48. 571 A.2d at 1380.

49. 701 A.2d at 176.

50. *Id.* Yet, in the plurality opinion, two justices argued to expand the means available to rebut the presumption of paternity to include the results of a blood test.

51. 571 A.2d at 1381.



prior to her marriage to husband, but the relationship resumed for a time during wife's marriage to husband.<sup>52</sup> Based upon this relationship, appellee, the alleged biological father, sought custody of Paula T.'s second child and wanted Paula T.'s husband to have a blood test to determine the paternity of the child.<sup>53</sup>

The Pennsylvania Superior Court granted the appellee's motion, but the Pennsylvania Supreme Court reversed the decision.<sup>54</sup> The court applied the presumption of paternity and asserted that, although the UABT "relaxed" the presumption somewhat, its enactment did not overcome the policy underlying the presumption of paternity, which is to protect the family.<sup>55</sup> The court ruled that the UABT did not "relax the presumption to the extent that a 'putative father,' a third party who stands outside the marital relationship and attempts to establish paternity over a child to the marriage, may compel the 'presumptive father,' the husband, to submit to blood tests."<sup>56</sup>

After a confusing and unclear decision by the Pennsylvania Supreme Court in 1993,<sup>57</sup> the court again took up the issue in 1997.<sup>58</sup> In *Brinkley v. King*, a family dissolved after the husband's discovery of his wife's infidelity and resulting pregnancy.<sup>59</sup> After the wife's divorce, she filed an action for child support against King, the wife's intimate partner and the alleged biological father of the child.<sup>60</sup> King claimed that Brinkley was precluded from challenging the paternity of the child.<sup>61</sup> King argued that because the child was conceived while Brinkley was married to her ex-husband, the presumption of paternity applied and had not been successfully rebutted.<sup>62</sup>

The Pennsylvania Superior Court applied the presumption of paternity, thereby concluding that Brinkley's ex-husband was the legal father of the child.<sup>63</sup> Two of three judges on the panel suggested that the Pennsylvania Supreme Court review the case to evaluate the function of the presumption of paternity.<sup>64</sup> The Pennsylvania Supreme Court

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52. *Id.*

53. *Id.*

54. *Id.* at 1382, 1388.

55. *Id.* at 1384-85.

56. *Id.* at 1384-85.

57. See *Jones v. Trojak*, 634 A.2d 201 (Pa. 1993). Although the court addressed the issues regarding the use of blood testing to rebut the presumption of paternity, a clear cut methodology regarding the decision was not found.

58. *Brinkley*, 701 A.2d at 176.

59. *Id.* at 177-78.

60. *Id.* at 178.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

granted allocotur and vacated the Superior Court's decision.<sup>65</sup> The court held that the presumption of paternity was inapplicable because Brinkley and her ex-husband were no longer married; thus there was no intact family to protect.<sup>66</sup> The court reasoned that, although the presumption of paternity applies when a child is conceived or born during marriage, it does not always apply unless "the policies which underlie the presumption . . . would be advanced by its application."<sup>67</sup>

The Pennsylvania Supreme Court, although it did not include the analysis in the opinion, affirmed that blood or DNA evidence was not admissible to rebut the presumption of paternity.<sup>68</sup> In a footnote, the court stated that it "decline[d] to accept Superior Court's suggestion that we expand the ways in which one can rebut the presumption of paternity . . . [t]he presumption of paternity continues to be rebutted, if at all, by evidence related to biology: there was no access or the presumptive father was incapable of procreation."<sup>69</sup>

The actual precedential value of *Brinkley v. King* was unclear because it was only a plurality opinion.<sup>70</sup> In looking at the opinion announcing the judgment of the court, it is clear that at least four of the Justices agreed on the outcome of the case, but disagreed as to why the outcome was appropriate.<sup>71</sup>

### *B. The Problematic Application of the Presumption of Paternity and the Resulting Inequities*

The Pennsylvania Supreme Court's initial attempts at clarifying the presumption of paternity set the stage for at least two ex-husbands to be held liable for the children of their deceitful wives.<sup>72</sup> The plurality opinion in *Brinkley* led to uneven treatment of the presumption of paternity by the Pennsylvania Superior Court.<sup>73</sup> In addition to refusing to allow blood or DNA evidence to rebut the presumption of paternity, the

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65. *Id.* at 178, 181.

66. *Id.* at 181.

67. *Id.*

68. *Id.* at 181 n.9.

69. *Id.*

70. *Id.* at 181.

71. *Id.* at 177-81, 181-82, 182-90.

72. See *Amrhein v. Cozad*, 714 A.2d 409 (Pa. Super. Ct. 1998); *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997).

73. See *Brinkley v. King*, 701 A.2d 176, 181 (Pa. 1997) (reasoning that if the parties are no longer married, the policy of preserving the family would not be served by applying the presumption of paternity); *Amrhein*, 714 A.2d at 409 (holding that the presumption of paternity is applicable where the child was born to an intact family, even if the parties were no longer married).

court in *Brinkley* did not explicitly define the proper application of the presumption of paternity. This lack of explicit definition left a gap in the law that allowed the presumption of paternity to be applied in an inequitable fashion.

In the Pennsylvania Supreme Court decisions of the late 1990s, the court applied the presumption of paternity to force fatherhood on duped ex-husbands.<sup>74</sup> The most notable recent case is *Miscovich v. Miscovich*.<sup>75</sup> *Miscovich* provoked great interest in the doctrine of the presumption of paternity because the outcome appeared so unjust.<sup>76</sup>

Gerald Miscovich, the challenging party, was deceived into believing he was the father of his wife's child and was legally held to be responsible for the child.<sup>77</sup> Gerald never questioned the paternity of the couple's child until two years after the divorce when, as pointed out by his new wife, he discovered that it was a genetic improbability for a child born to him and his ex-wife to have brown eyes.<sup>78</sup> Subsequent blood testing excluded Gerald as the child's father.<sup>79</sup>

Gerald confronted his ex-wife with the blood test results, and she filed a support action against the alleged biological father, but the trial court applied the presumption of paternity and found that the presumption had not been rebutted.<sup>80</sup> Gerald appealed the trial court's decision, arguing that the presumption of paternity should not apply because there is no longer an intact family to preserve, and the UABT commanded the court to admit blood evidence.<sup>81</sup>

On appeal, the Pennsylvania Superior Court held that the presumption of paternity was properly applied and was not overcome.<sup>82</sup> The court held that blood or DNA evidence was not admissible to rebut the presumption of paternity.<sup>83</sup> The court reasoned that blood or DNA evidence was only admissible to determine paternity once the presumption of paternity is successfully overcome by one of the traditional means.<sup>84</sup>

The Pennsylvania Superior Court decision in *Amrhein v. Cozad* further demonstrates how prior applications of the presumption of

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74. See *supra* note 72.

75. 688 A.2d at 726.

76. Danielle N. Rodier, *Proposed Bill Could Abolish Presumption of Paternity*, PA. L. WKLY., Mar. 15, 1999, at 1, 27.

77. *Miscovich*, 688 A.2d at 727.

78. *Id.*; see also William C. Smith, *Daddy No More*, ABA J., July 1999, at 30.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 733.

83. *Id.*

84. *Id.*

paternity produced absurd results.<sup>85</sup> A panel of the Superior Court, sitting in Pittsburgh, applied the presumption of paternity in a situation where wife and ex-husband were already separated.<sup>86</sup>

In *Amrhein*, both the wife and ex-husband had engaged in extra-marital affairs.<sup>87</sup> When the wife became pregnant, she thought it unlikely that her husband had fathered the child because she believed that the couple was incapable of conceiving.<sup>88</sup> At the wife's request, paternity testing was performed, and it revealed that her ex-husband could not be the child's father.<sup>89</sup> The parties subsequently separated, and the wife brought a child support claim against her intimate partner, the child's alleged biological father.<sup>90</sup>

The lower court denied the wife's claim against the alleged biological father and entered an order requiring the ex-husband to pay child support.<sup>91</sup> The ex-husband appealed the lower court's order, but the Pennsylvania Superior Court affirmed the holding.<sup>92</sup> The court applied the presumption of paternity because the child had been born while the wife and ex-husband were still living as a married couple and concluded that it had not been rebutted by one of the traditional means.<sup>93</sup> The court reasoned that the presumption of paternity is applicable as long as the family was intact at the time of birth.<sup>94</sup>

The court further reasoned that applying the presumption of paternity only when the parties were still married would defeat the policy underlying the presumption of paternity and the doctrine of paternity by estoppel.<sup>95</sup> The court reasoned that not applying the presumption of paternity when the parties were divorced or separated would encourage independent paternity determinations and result in separation of the couple.<sup>96</sup> Therefore, the protection of the family unit would be ineffective because many parties would separate after receiving results from independent paternity determinations.

Moreover, the court did not allow the use of blood evidence to rebut the presumption of paternity.<sup>97</sup> The court did not interpret *Brinkley* to

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85. 714 A.2d at 409.

86. *Id.* at 410.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 411.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 413.

allow the use of blood evidence to rebut the presumption of paternity.<sup>98</sup> The court reasoned that if it allowed the use of blood evidence, the underlying purpose and policy for the presumption of paternity would be overcome.<sup>99</sup>

Hence, the court held a soon-to-be ex-husband liable for the support of a child conceived by his wife while she was engaged in an extramarital affair, which was unknown to him until a year after the child's birth.<sup>100</sup> The ex-husband, once he was informed of the truth, left his wife and the family was no longer intact.<sup>101</sup> The application of the presumption of paternity in *Amrhein* did nothing more than legally require an unsuspecting husband to care for his adulterous wife's child.

*C. The Pennsylvania Supreme Court Affirms the Importance of the Presumption of Paternity but Significantly Alters Its Application*

The late 1990s was filled with conflict regarding the presumption of paternity. The issue of whether or not to allow blood and/or DNA evidence to rebut the presumption of paternity was debated. Several Pennsylvania Supreme Court Justices expressed distaste for both the presumption of paternity and the doctrine of paternity by estoppel.<sup>102</sup> The Pennsylvania Supreme Court decisions in *John M.* and *Brinkley*, and the Superior Court decisions that followed, muddled the waters and created some problematic results. Ultimately, the Pennsylvania Supreme Court appeared prepared to discard the presumption of paternity in late 1999.<sup>103</sup>

In *Fish v. Behers*, a child was born to Ruth Fish during her marriage to David Fish.<sup>104</sup> Unbeknownst to Ruth Fish's husband, the pregnancy resulted from an extramarital affair with Robert Behers, Jr.<sup>105</sup> Ruth informed Behers that he was the father.<sup>106</sup> The child was born in 1989, and Ruth did not reveal to her husband that he was not the father of the

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98. *Id.* at 412-13.

99. *Id.* at 411.

100. *See id.* at 409-11.

101. *Id.* at 410.

102. *See, e.g.,* *Strauser v. Stahr*, 726 A.2d 1052, 1056-58 (Pa. 1999) (Nigro, J. and Newman, J., dissenting); *Fish v. Behers*, 741 A.2d 721, 724-25 (Pa. 1999) (Nigro, J. and Newman, J. dissenting).

103. *Fish*, 741 A.2d at 721; *see also* Julie A. Auerbach, *In Fish v. Behers, Pennsylvania High Court All But Eliminates Presumption of Husband's Paternity*, L. INTELLIGENCER, Jan. 26, 2000, at 7.

104. *Fish*, 741 A.2d at 722.

105. *Id.*

106. *Id.* Ruth initially wanted to have an abortion, but decided otherwise after speaking with Behers. *Id.*

child.<sup>107</sup> Although her husband did question the child's paternity on several occasions, he accepted the child as his own.<sup>108</sup>

Ruth revealed to her husband in 1992 that he was not the biological father of the child.<sup>109</sup> After paternity testing confirmed Ruth's admission, David Fish filed for divorce.<sup>110</sup> Upon divorce, the parties agreed that David Fish would support his two children of the marriage, but not Ruth's son conceived during an extramarital affair.<sup>111</sup> In 1994, Ruth filed an action for child support against Behers.<sup>112</sup> The trial court allowed the action to move forward, but the Superior Court reversed the trial court's decision and ruled that Ruth was estopped from challenging the child's paternity.<sup>113</sup> The court did not address the issue of whether blood or DNA evidence was admissible to rebut the presumption of paternity.<sup>114</sup>

The Pennsylvania Supreme Court ultimately decided the case in December 1999.<sup>115</sup> The court held that the presumption of paternity was inapplicable because, due to the parties' separation and subsequent divorce, there was no longer an intact family to protect.<sup>116</sup> Yet, the court dismissed Ruth's action by ruling that Ruth was estopped from challenging her child's paternity because of David Fish's ongoing treatment of the child as his own.<sup>117</sup> The court applied the doctrine of paternity by estoppel to hold Ruth estopped from challenging the child's paternity.<sup>118</sup>

The decision in *Fish* had a strong dissent.<sup>119</sup> Justice Nigro and Justice Newman reiterated their arguments against the presumption of paternity set forth in prior decisions.<sup>120</sup> The justices also argued against the strict application of the doctrine of paternity by estoppel in cases such as *Fish*.<sup>121</sup> The dissent addressed the inequities created by the court's deliberate ignorance of credible blood evidence that proved that David

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See generally id.*

115. *Id.* at 721.

116. *Id.* at 722.

117. *Id.* at 724.

118. *Id.* at 724-25. *See also infra* text accompanying notes 132-47 (discussing theory of paternity by estoppel).

119. *Id.* (Newman, J. and Nigro, J., dissenting).

120. *Id.* at 724.

121. *Id.*

Fish was not the child's biological father.<sup>122</sup> The dissenting Justices argued that the trial court should be given discretion in these types of situations and the doctrine of estoppel should not be strictly applied.<sup>123</sup>

The dissenting justices advocated that the trial court should have "the discretion to order paternity tests and then consider such evidence along with other factors relevant to making a decision in the best interests of the child."<sup>124</sup> The dissenters rationalized that such an approach would not only prevent the "duped father" from being saddled with the legal responsibilities for a child that is not his, but would also prevent a biological father from avoiding his legal responsibilities to a child he fathered.<sup>125</sup>

*D. The Interplay of the Presumption of Paternity and Paternity by Estoppel*

Successfully rebutting the presumption of paternity is difficult and rare.<sup>126</sup> Successfully arguing that the presumption of paternity is inapplicable in a present situation could be just as difficult.<sup>127</sup> Yet, if a successful challenge is made on either ground, the party challenging the paternity of a child may still face a hurdle if the court strictly applies the doctrine of paternity by estoppel.<sup>128</sup>

The Pennsylvania Supreme Court has stated that "the legal identification of a father . . . even in a case involving the presumption of paternity, may also involve the question of estoppel."<sup>129</sup> In applying the doctrine of paternity by estoppel, one or both of the parties may be estopped from challenging the child's paternity because he or she acted as the child's parent.<sup>130</sup>

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122. *Id.* at 724-25.

123. *Id.* at 725.

124. *Id.*

125. *Id.*

126. *See supra* notes 25-46 and accompanying text (discussing the methods available to rebut the presumption of paternity and how the methods have evolved somewhat over time).

127. *See generally supra* Part III.C (discussing the application of the presumption of paternity in recent cases in Pennsylvania).

128. *See supra* Part III.C (discussing recent Pennsylvania Supreme Court case in which the presumption of paternity was deemed inapplicable, but the doctrine of paternity by estoppel was applied); *see generally* Heather Faust, Comment, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of the Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests To Determine Paternity*, 100 DICK. L. REV. 963 (1996) (discussing problems caused by presumption of paternity and the doctrine of paternity by estoppel, specifically in light of the inability of parties to rebut the presumption of paternity using blood evidence).

129. *Brinkley v. King*, 701 A.2d 176, 179 (Pa. 1997).

130. *Id.* at 179-80.

Paternity by estoppel is "merely a legal determination that because of a person's conduct that person, regardless of his true biological status, will not be permitted to deny parentage, nor . . . sue a third party for support."<sup>131</sup> The legal analysis that occurs during a challenge to the paternity of a child born during wedlock has two parts: "[F]irst, one considers whether the presumption of paternity applies to a particular case. If it does, one then considers whether the presumption has been rebutted by one of the traditional methods. Second, if the presumption has been rebutted or is inapplicable, one then questions whether estoppel applies."<sup>132</sup>

In determining whether a party is estopped from challenging a child's paternity, the court will examine whether the party has treated the child as his or her own.<sup>133</sup> Generally, to act as treating a child as one's own includes holding the child out as one's own and supporting the child.<sup>134</sup>

The application of the doctrine of paternity by estoppel does have a small amount of flexibility, which plays an important role in situations such as that presented in *Miscovich*.<sup>135</sup> As reasoned by the Pennsylvania Superior Court in *Sekol*, a party challenging a child's paternity or seeking to establish a child's paternity may not be estopped if fraud or misrepresentation is involved.<sup>136</sup>

As discussed above, Gerald Miscovich was deceived into believing he was the father of his ex-wife's child.<sup>137</sup> Further, Gerald no longer held the child out as his own once he discovered he was not the biological father.<sup>138</sup> Although it is not certain based upon earlier cases, it seems as if the court had refused to apply the presumption of paternity, Gerald would not have been estopped from challenging his child's paternity because 1) he no longer held the child out as his own; and 2) his wife had committed fraud.

Further, as demonstrated by a very recent Pennsylvania Superior

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131. *Id.* at 180, n.5 (citing *Freedman v. McCandless*, 654 A.2d 529 (Pa. 1995)).

132. *Id.*

133. *Id.* at 410.

134. *Id.* The Pennsylvania Supreme Court reasoned that "[e]stoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not his father." *Id.*

135. *See, e.g., Sekol v. Delsantro*, 763 A.2d 351, 405 (Pa. Super. Ct. 2000) (discussing the need for the trial court to consider any issues of fraud or misrepresentation); *Kohler v. Bleem*, 654 A.2d 569 (Pa. Super. Ct. 1995) (noting that the trial court must consider allegations of fraud or misrepresentation).

136. *Sekol*, 763 A.2d at 410-11.

137. *See supra* text accompanying notes 74-84.

138. *See supra* text accompanying notes 74-84.



Court decision, a defrauded father was not estopped from challenging the paternity of a child conceived during his marriage to the child's mother.<sup>139</sup> In *Doran v. Doran*, the child at issue was born during the marriage of the two litigating parties.<sup>140</sup> The parties subsequently divorced, and the ex-husband entered into an agreement with his ex-wife for the payment of child support for the son.<sup>141</sup>

When the child was approximately six-years old, the ex-husband suspected that he was not the child's biological father.<sup>142</sup> After being reassured by the ex-wife that he was the biological father, he continued to pay child support and treat the child as his own.<sup>143</sup> A few years later, the ex-husband again became suspicious of the child's paternity, and DNA testing was performed to determine the child's paternity.<sup>144</sup> The tests demonstrated that there was a zero percent probability that the ex-husband was the child's father.<sup>145</sup>

The ex-husband asked the court to relieve him of his support obligation.<sup>146</sup> The trial court granted the ex-husband's motion, but the ex-wife appealed.<sup>147</sup> The child's mother argued that her ex-husband was barred from challenging the paternity of the child because the presumption of paternity applied.<sup>148</sup> She further argued that if the presumption of paternity did not apply, the father was estopped from challenging the child's paternity.<sup>149</sup>

The Pennsylvania Superior Court held that the presumption of paternity was inapplicable because, as demonstrated by *Fish v. Behers*, there was no longer an intact family and, therefore, the policy underlying the presumption of paternity would not be met.<sup>150</sup> The court further held that the ex-husband was not estopped from challenging the child's paternity because his ex-wife had committed fraud; hence the ex-husband "would not have held the child out as his own had it not been for [his ex-wife's] fraudulent conduct."<sup>151</sup>

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139. *Doran v. Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003).

140. *Id.* at 1281.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Doran*, 820 A.2d at 1281.

146. *Id.*

147. *Id.*

148. *Id.* at 1282.

149. *Id.*

150. *Id.* (citing *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999)).

151. *Id.* at 1284.

*E. The Legislature's Attempts To Regulate the Presumption of Paternity and Paternity by Estoppel*

In 1999, the Pennsylvania legislature looked at several bills that would allow an individual challenging the paternity of a child two additional methods of rebutting the presumption of paternity.<sup>152</sup> Representative Rod Wilt sponsored the bill.<sup>153</sup> The proposed legislation stated that "the General Assembly finds that the common law rule followed by the Pennsylvania courts relating to the presumption of paternity for a child born during marriage is an ancient concept that fails to conform with modern-day realities and current scientific methods of determining parentage."<sup>154</sup> The Pennsylvania Bar Association publicly opposed the proposed legislation.<sup>155</sup>

The bill directed that the presumption of paternity applied when the married parties were cohabitating at the time of the child's birth.<sup>156</sup> Additionally, the proposed legislation would have allowed two other methods for rebutting the presumption of paternity: (1) if the wife was

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152. H.R. 521, 185th Gen. Assem., Reg. Sess. (Pa. 1999); H.R. 522, 185th Gen. Assem., Reg. Sess. (Pa. 1999); H.R. 523, 185th Gen. Assem., Reg. Sess. (Pa. 1999); S. 516, 184th Gen. Assem., Reg. Sess. (Pa. 1999). For purposes of this Comment, discussion will focus on H.R. 521.

153. Pa. H.R. 521.

154. *Id.*

155. Ned Mark & Howard M. Goldsmith, *Report of the Taskforce Appointed by Family Law Section Chair, James Mahood and Chair-Elect, Mary Cushing Doherty To Review Pending Legislation*, 1999 P.B.A. SEC. FAM. L., at 14-26.

156. Pa. H.R. 521. The text of the proposed bill included the following:

§ 5102.1. Paternity of child born during marriage.

(a) Presumption of paternity. A child born during a marriage is presumed to be the child of the marriage and the issue of the husband.

(b) Rebuttable presumption. The husband or wife may rebut the presumption of paternity by a showing of any of the following:

(1) the husband did not have access to the wife at the time of conception;

(2) the husband was physically incapable of procreation at the time of conception;

(3) the wife engaged in an extra-marital affair at the time of conception; or

(4) the husband voluntarily completed a blood test which determines that the husband could not be the father of the child.

(c) Applicability of the presumption. The presumption of paternity in subsection (a) shall apply in instances where the husband and wife cohabitated at the time of the birth of the child.

(d) Estoppel of paternity actions. Notwithstanding subsection (b), an action for paternity shall become irrebuttable if there is clear and convincing evidence that the husband openly holds out the child to be his and receives the child into his home for a period of two or more years after the birth of the child.

engaged in an extramarital relationship at the time of conception, or (2) if the husband voluntarily completed a blood test that determined that the husband could not be the father of the child.<sup>157</sup> The bill was a legislative reaction to the recent Pennsylvania Supreme Court decision in *Miscovich v. Miscovich*.<sup>158</sup> In the Pennsylvania Senate, the bill died in the Rules and Executive Nominations Committee.<sup>159</sup> In the Pennsylvania House of Representatives, the bill died in the House Judiciary Committee.<sup>160</sup>

In 2001, the Pennsylvania legislature again became involved in the debate.<sup>161</sup> The 2001 proposed bill would have amended the current Pennsylvania statute governing how blood tests may be used to determine paternity.<sup>162</sup> Senator O'Pake introduced a bill addressing the

157. *Id.*

158. Rodier, *supra* note 76, at 1, 27.

159. *On The Hill*, PA. LAW., Mar.-Apr. 2001, at 57.

160. Telephone interview with Kathy Reighter, Administrative Secretary, Pennsylvania State Legislature House of Representative Judiciary Committee (Jan. 16, 2003) (discussing the process by which a proposed bill dies when the session closes and the bill was never acted upon).

161. S. 802, 184th Gen. Assem., Reg. Sess. (Pa. 2001); H.R. 2701, 185th Gen. Assem., Reg. Sess. (Pa. 2001). For purposes of this Comment, discussion will focus on H.R. 2701.

162. Pa. H.R. 2701. The proposed bill sought to amend the current legislation. Importantly, the bill would have eliminated subsection g of the current statute, which reads: "The presumption of legitimacy of a child born during wedlock is overcome if the court finds the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child." 23 PA. CONS. STAT. § 5104 (2002). The bill would add subsection (h):

(h) Effect on Presumption of Paternity. The presumption of paternity of a child born during wedlock as recognized prior to the effective date of this subsection in this Commonwealth is reaffirmed and made subject to the following provisions:

(1) Upon petition for testing in an action in which paternity of a child is an issue filed not later than five years after the child's birth, the court shall permit testing to rebut the presumption of paternity provided that the overall interest of justice, including the best interests of the child, would not be unreasonably harmed and :

(i) the parties subject to the presumption are divorced or irreconcilably separated, and one or both assert reasonable grounds to believe that application of the presumption is likely to result in an incorrect paternity determination;

(ii) the parties subject to the presumption mutually agree to submit and be bound to the testing; or

(iii) if either party subject to the presumption has voluntarily submitted to testing or permitted the child to be subject to testing, including prenatal testing, the court may allow the test results to be reviewed by experts and the experts' conclusions to be reported to the court or order the parties to submit to testing pursuant to subsection (c).

(2) No party who requests testing under this section shall be required to show clear and convincing evidence of the husband's inability to procreate or lack of access to the mother.

determination of paternity in April 2001, and the bill was sent to the Senate Judiciary Committee.<sup>163</sup> A large number of State Representatives introduced the same bill in the House of Representatives in June 2002, and the bill was sent to the House Judiciary Committee.<sup>164</sup>

The House Judiciary Committee met to debate the proposed legislation in mid-September.<sup>165</sup> During the meeting, the Children's Rights Committee expressed their concerns for the well being of the children who will be affected directly if the law is changed in the proposed manner.<sup>166</sup> The bill died at the end of the 2002 session, but there are plans to reintroduce the bill when the assembly session begins in 2003.<sup>167</sup>

#### IV. The Futility of the Legislative Attempts at Redefining the Presumption of Paternity and Paternity by Estoppel: The Pennsylvania Courts Answered Equity's Call

The problems associated with the presumption of paternity and the Pennsylvania Supreme Court's refusal to allow the use of blood or DNA evidence were numerous. The doctrine of the presumption of paternity and the doctrine of paternity by estoppel created forced parenthood.<sup>168</sup> Further, the application of the presumption of paternity was unpredictable.<sup>169</sup> Yet, as demonstrated by the most recent string of Pennsylvania Superior Court cases, the most egregious inequities associated with the presumption of paternity and paternity by estoppel

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(3) A party requesting testing under this section shall be required to bear all testing and court costs if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is the father of the child.

(4) The presumption of paternity is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.

(5) The principle of paternity by estoppel shall not be applied where testing is sought under this section and the court finds that not applying the principle of paternity by estoppel is in the best interests of the child.

Pa. H.R. 2701.

163. Pa. S. 802.

164. Pa. H.R. 2701.

165. Telephone Interview with Karen Daulton, Staff Member, Pennsylvania House of Representatives Judiciary Committee (Nov. 20, 2002).

166. *Id.*

167. Telephone interview with Bill Casey, Counsel to Pennsylvania Senator O'Pake (Jan. 16, 2003).

168. See *Miscovich v. Miscovich*, 688 A.2d 726 (Pa. Super. Ct. 1997) (holding ex-husband, although not biological father, legally the father due to application of the presumption of paternity); see also *Fish v. Behers*, 741 A.2d 721 (Pa. 1999) (applying the doctrine of paternity by estoppel, after the presumption of paternity was deemed inapplicable, to hold a ex-husband to be legally responsible for a child he did not father).

169. See *supra* Part III.B.

have been remedied.<sup>170</sup>

A. *Forced Fatherhood: How the Presumption of Paternity and the Doctrine of Paternity by Estoppel Created Parenthood Where It Did Not Exist*

Prior to *Fish v. Behers*, the presumption of paternity had the ability to affect the lives of married couples in a negative way: it was possible for unsuspecting husbands to become legally responsible for the children of their adulterous wives. The most illustrative decision of forced fatherhood is the case of *Miscovich v. Miscovich*, in which an ex-husband was held to be the legal father of his adulterous and misrepresenting wife's child.<sup>171</sup>

Therefore, in *Miscovich*, an adulterous wife deceived her husband into fatherhood, and the courts would not relieve him of that obligation.<sup>172</sup> A father, who was not the biological father of the child born during his former marriage, was held liable for financially supporting the child. Moreover, the trial and superior courts' application of the presumption of paternity was contrary to the policies underlying the presumption of paternity.<sup>173</sup> As stated by the Pennsylvania Supreme Court, the presumption of paternity should only be applied when the underlying purpose, preservation of the marriage, is served.<sup>174</sup> Because the parties had divorced, the application of the presumption of paternity served only to force Gerald Miscovich into fatherhood of the child of his adulterous wife.

After the Pennsylvania Supreme Court stated in *Fish* that the presumption of paternity would not apply when the parties were no longer married, a semblance of predictability and consistency emerged in the courts.<sup>175</sup> The Pennsylvania Supreme Court's decision in *Fish v. Behers* clarified the application of the presumption of paternity and

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170. The courts are now applying the presumption of paternity in the manner outlined in *Fish v. Behers*. For example, most recently, in *Doran v. Doran*, the Pennsylvania Superior Court held that the presumption of paternity did not apply when the parties to the action were divorced. 820 A.2d 1279 (Pa. Super. Ct. 2003). The court followed the lead of *Fish v. Behers* and directly cited the Pennsylvania Supreme Court's language that "[t]he policy underlying the presumption of the paternity is the preservation of marriages . . . it only applies in cases where that policy would be advanced by the application." *Id.* Further, in *J.C. v. J.S.*, the Pennsylvania Superior Court also followed the lead of *Fish* and held that the presumption of paternity was not applicable to the case because the parties were no longer married. 826 A.2d 1 (Pa. Super. Ct. 2003).

171. 688 A.2d at 726.

172. *Id.*

173. See *Brinkley v. King*, 701 A.2d 176, 180-81 (Pa. 1997) (stating that the policy underlying the presumption of paternity is the preservation of the marriage).

174. *Id.* at 181.

175. See, e.g., *Doran*, 820 A.2d at 1279; *J.C.*, 826 A.2d at 1.

allowed it to function in a more equitable manner.<sup>176</sup>

*B. The Superior Court Recognizes That the Doctrine of Paternity by Estoppel Should Not Operate To Force Fatherhood on Misled Ex-Husbands*

Prior to the *Doran* decision in 2003, even if the presumption of paternity was not applied, the doctrine of paternity by estoppel was applied in an unpredictable fashion. Because in most situations where a wife has misrepresented to her husband that the child born during their marriage is his, it can be assumed that he would treat the child as his own. Therefore, the husband's responsible actions would lead to a legal responsibility he may not have been seeking.<sup>177</sup>

*C. The Possible Impact of the Proposed Legislation*

1. The 1999 Bill

In the 1999 legislative session, Representative Rod Wilt, in conjunction with various co-sponsors, proposed a bill that would have allowed additional methods to rebut the presumption of paternity and defined the situation in which the presumption of paternity is applicable.<sup>178</sup>

The legislation stated that "the presumption of paternity in subsection (a) shall apply in instances where the husband and wife cohabitated at the time of the birth."<sup>179</sup> By directing the application of the presumption of paternity, the proposed legislation would have resolved the conflicts demonstrated by the Pennsylvania Superior Court decisions in 1998 and 1999.<sup>180</sup> In contrast with the current state of the law,<sup>181</sup> the bill would allow parties to rebut the presumption of paternity with blood evidence.<sup>182</sup>

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176. See *supra* note 170.

177. See *supra* text accompanying notes 126-51 (discussing what a husband would have done to apply the doctrine of paternity by estoppel).

178. H.R. 521, 185th Gen. Assem., Reg. Sess. (Pa. 1999); see also *supra* note 150 (giving text of proposed legislation).

179. Pa. H.R. 521; see also *supra* note 150 (giving text of proposed legislation).

180. See, e.g., *supra* text accompanying notes 72-101 (giving an example of conflicting opinions from two superior courts).

181. See *supra* text accompanying notes 59-71 (discussing Pennsylvania Supreme Court's lead ruling on the admissibility of blood evidence to rebut the presumption of paternity).

182. Pa. H.R. 521. The proposed bill named four methods by which a party could rebut the presumption of paternity: (1) by proving the husband did not have access to the wife at the time of conception; (2) by proving the husband was physically incapable of

The legislation also directed the application of the doctrine of paternity by estoppel.<sup>183</sup> The proposed bill would only estop parties from challenging the paternity of their child if “there is clear and convincing evidence that the husband openly holds out the child as his and receives the child into his home for a period of two years or more years after birth of the child.”<sup>184</sup>

Although the bill limited the allotted time period in which the party may rebut the presumption of paternity using blood evidence,<sup>185</sup> or one of the other methods listed, to two years, the legislation would have afforded defrauded fathers a better opportunity for rebuttal than the current state of the law.

## 2. The 2001-2002 Bill

The Pennsylvania General Assembly again considered legislation addressing the doctrines of the presumption of paternity and paternity by estoppel in the 2001-2002 regular session.<sup>186</sup> The bill would have allowed parties to overcome the presumption of paternity with blood evidence under certain circumstances similar to those proposed in the 1999 bill.<sup>187</sup> The proposed amendment would have: (1) allowed a party to use blood evidence to rebut the presumption of paternity if the action to challenge the paternity is filed no later than five years after the child's birth *and* the “overall interests of justice, including the best interests of the child, would not be harmed;” and (2) one of three additional criteria were met.<sup>188</sup>

The proposed bill would have opened the door for deceived fathers

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procreation at the time of conception; (3) by proving the wife was engaged in an extramarital affair at the time of conception; and (4) the husband voluntarily completed a blood test which determines that the husband could not be the father of the child. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. H.R. 2701, 186th Gen. Assem., Reg. Sess (2002) (the legislation sought to amend Section 5104 of Title 23 of the Pennsylvania Consolidated Statutes).

187. *Id.*

188. Pa. H.R. 2701. The relevant test reads:

- (i) the parties subject to the presumption are divorced or irreconcilably separated, and one or both assert reasonable grounds to believe that application of the presumption is likely to result in an incorrect paternity determination;
- (ii) the parties subject to the presumption mutually agree to submit to and be bound by the testing; or
- (iii) if either party subject to the presumption has voluntarily submitted to testing or permitted the child to be subject to testing, including prenatal testing, the court may allow the test results to be reviewed by experts and the experts' conclusions reported to the court or the parties to submit to testing pursuant to subsection(c).

*Id.*

to escape the forced fatherhood created by their adulterous wives. Although the husband would have to challenge the child's paternity within five years of the child's birth and ensure that justice would not be harmed by the paternity challenge, at minimum it would have given defrauded husbands an opportunity to challenge the paternity of the child.

The bill considered in 2001-2002 gave some direction to the courts' application of the doctrine of paternity by estoppel.<sup>189</sup> The bill did not advocate strict application of the doctrine of paternity by estoppel; rather, the bill states that the principle should be applied only when testing was not sought under Section 5104 and the court has found the application would be in the best interests of the child.<sup>190</sup>

The clause concerning the doctrine of paternity by estoppel would have lessened the courts' general standard of application and allowed the interests of the child to become a relevant factor in the paternity determination. This addition would have focused a court's analysis on the facts of an individual situation. Such a focus would have led to more equitable results because the actual interests of the child would be considered. Therefore, even if application of paternity by estoppel appeared warranted, it may have been avoided if the family situation was such that a child may benefit from knowing his or her biological father.

### 3. The Current Bill Proposal

After the bill proposed in the 2001-2002 session died, new bills concerning blood and DNA evidence and paternity were introduced in the Pennsylvania legislature.<sup>191</sup> The bills proposed in the 2003 session would have little or no effect on the current state of the law of the doctrines of the presumption of paternity and paternity by estoppel. There are currently three proposed bills floating around the House and Senate.<sup>192</sup> In contrast to past bills, the present bills propose only that blood and/or DNA evidence be allowed to rebut the presumption of paternity and only in limited circumstances.<sup>193</sup> The bills do not include any provisions that would direct the application of the presumption of paternity or paternity by estoppel. Therefore, technically, the proposed bills would allow blood or DNA evidence to rebut the presumption of paternity, but there would be no practical impact of the proposed bills.

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189. *Id.*

190. *Id.*

191. S. 108, 187th Gen. Assem., Reg. Sess. (Pa. 2003); H.R. 1655, 187th Gen. Assem., Reg. Sess. (Pa. 2003); H.R. 1562, 187th Gen. Assem., Reg. Sess. (Pa. 2003).

192. Pa. S. 108; Pa. H.R. 1655; Pa. H.R. 1562.

193. Pa. S. 108; Pa. H.R. 1655; Pa. H.R. 1562.



The current bill proposals would have little or no practical impact because of the recent developments in the law, as set forth by the Pennsylvania Supreme Court. Prior to 1999 and the decision in *Fish v. Behers*, the courts did not have clear direction as to the proper application of the presumption of paternity. The courts, as demonstrated in *Miscovich* and *Amhrien*, had the power to trap deceived ex-husbands using the presumption of paternity.<sup>194</sup> Yet, when *Fish* was decided, the court no longer could use the presumption of paternity to force fatherhood upon ex-husbands because the presumption did not apply if the parties were separated or divorced.<sup>195</sup> Therefore, it is now unimportant if blood or DNA evidence can be used to rebut the presumption of paternity. It is unlikely that an intact family would ever challenge the paternity of a member of the family, and because the presumption of paternity only applies to intact families, further methods of rebuttal are really not needed.

The purpose of this Comment was to address the most egregious of inequities resulting from the application of the presumption of paternity and paternity by estoppel. This is the forcing of fatherhood upon ex-husbands who had been tricked into taking responsibility for their adulterous wives' children. The inequity to the ex-husbands in those situations outweighs the interest in ensuring that a child knows the identity of his or her parents. Yet, when *Fish v. Behers* was decided in 1999, the law no longer applied the presumption of paternity to situations in which the family was no longer intact. This prevented the court from imposing fatherhood upon an ex-husband who left his wife because he found out about her adultery and subsequent deceit regarding the paternity of the child.

## V. Conclusion

The presumption of paternity and paternity by estoppel are legal fictions. They create legal parenthood when biological parenthood can be proven. Yet, the doctrines serve a useful purpose in society: they ensure that a child knows who his or her parents are.

However, there was a time when the injustice served upon a legally determined father outweighed the injustice that would be served upon the child. During the late 1990s, as demonstrated by *Miscovich* and *Amhrien*, the Pennsylvania courts allowed adulterous and dishonest mothers to impose legal responsibility upon their innocent, although not necessarily honorable, ex-husbands.

The practical outcomes of *Miscovich* and *Amhrein* formed the basis

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194. See *supra* notes 9, 75-100 and accompanying text.

195. See *supra* notes 104-125 and accompanying text.

for most of the public outcry against the presumption of paternity and paternity by estoppel. The cases demonstrated the worst of an unpopular doctrine. Demands for either the abolishment of the doctrines or the use of blood and DNA evidence to rebut the presumption of paternity abound.

Yet, although the legislature made several unsuccessful attempts to reform the doctrines of the presumption of paternity and paternity by estoppel, it was the Pennsylvania Supreme Court that ultimately, and quietly, came up with what appears the most workable solution to an age-old problem. The court's decision in *Fish v. Behers* clarified the proper application of the presumption of paternity and prevents it from being used in further cases to legally bind deceived ex-husbands in an egregiously inequitable manner.

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